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POTENTIAL RESTRAINT OF TRADE UNDER THE SHERMAN ANTI-TRUST ACT.—Among the influences that led to the enactment of the Sherman Anti-Trust Law was the doubt whether the Federal jurisprudence possessed a common law.[1] It is well settled that a common law of Federal crimes has no existence.[2] There was reasonable doubt whether the United States possessed any common law, except insofar as the interpretation of statutes was in the light of the common law.[3] Hence in the absence of a Federal statute, there was no jurisdiction to prevent or punish restraint of trade or unlawful conspiracies and combinations to restrain trade, which were becoming a menace in the form of trusts with vast aggregations of capital, monopolizing many important branches of trade in this country. Congress intended the Sherman Act to be declaratory of the common law, so far as the substantive provisions are concerned.[4]

[1] Standard Oil Co. of N. J. *v.* U. S., 221 U. S. 1, 34 L. R. A. (N. S.) 834, 1 VA. L. REV. 188, 189.
[2] U. S. *v.* Eaton, 144 U. S. 677; U. S. *v.* Hudson, 7 Cranch 32.
[3] See Standard Oil Case, *supra.*
[4] Ibid. See also the dissenting opinion of Mr. Justice White in U. S. *v.* Trans-Missouri Freight Assn., 166 U. S. 290; Senate Debates, 21 Cong. Rec. 2456, 3146. Of course, at common law the contract was passively invalid in the sense of being unenforceable, while the Sherman Act prohibits contracts and agreements in restraint of trade, making the parties guilty of a misdemeanor and providing for injunctions and dissolutions of combinations.

At a remote period under the common law of England, restraint of trade referred to some restraint imposed by contract by an individual on his right to pursue his trade or vocation. Originally these contracts were illegal because they were considered injurious to the public as well as to the individuals who made them.[5] In the interest of freedom of contract the doctrine was modified, making void only those contracts wherein the restraint was so general as to be coterminous with the realm. Restraints partial in operation and otherwise reasonable were valid and enforceable.[6] It is now settled by the weight of authority that even though the restraint is general, if it is otherwise reasonable and no broader than is necessary for the protection of the promisee, the contract is valid.[7] Thus "the rule of reason" was the common law test of the validity of contracts in restraint of trade.

In the first case under the Sherman Act to receive the attention of the Supreme Court, the monopoly was held not to be within the purview of the Statute because the transaction was intrastate and not interstate,[8] hence the court was not called upon to discuss the kind of restraint denoted by the Act. In the Traffic Cases,[9] however, the Supreme Court for the first time laid down the principle that under the Sherman Act every restraint of trade whether reasonable or unreasonable is unlawful, consequently giving §§ 1 and 2 of the Act [10] a much broader application than the common law doctrine.[11]

The Addyston Case [12] negatived the supposed authority of the

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[5] For an excellent discussion of the reasons and doctrines of the common law on the subject, see U. S. *v.* Addyston Pipe and Steel Co. (C. C. A.), 85 Fed. 271.

[6] Ibid. See also Standard Oil Case, *supra.*

[7] Roussillon *v.* Roussillon, 14 Ch. D. 351; The Maxim-Nordenfelt Gun Co. *v.* Nordenfelt, (1894) App. Cas. 535. See also Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 60 Am. Rep. 464.

[8] U. S. *v.* E. C. Knight Co., 156 U. S. 1.

[9] U. S. *v.* Trans-Missouri Freight Assn., 166 U. S. 290; U. S. *v.* Joint Traffic Assn., 171 U. S. 505.

[10] 26 U. S. Stat. at L. 209, § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor." § 2: "Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

[11] In Loewe *v.* Lawlor, 208 U. S. 274, Chief Justice Fuller, speaking for the whole court without dissent says: "The cases (citing the Traffic Cases, *supra;* Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211; and Montague and Co. *v.* Lowrie, 193 U. S. 38), hold in effect that the Anti-Trust Law has a broader application than the prohibition of restraint of trade unlawful at common law." See also Northern Securities Co. *v.* U. S., 193 U. S. 197.

[12] Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211.

Sugar Trust Case for the proposition that the Act was powerless to repress industrial combinations or agreements in restraint of trade. Thereafter the government exhibited astounding activity in instituting suits for dissolution of industrial combines. After twenty years of the existence of the Sherman Law, the leading case of the *United States* v. *Standard Oil Co., of New Jersey,*[13] came before the Circuit Court. The court disregarded the common law test of reasonableness for the determination of the legality of the combination under § 1 of the Act and proposed and applied the test of directness: whether the necessary effect of the combination is directly and immediately or merely indirectly and incidentally to restrain competition in interstate commerce.[14] But on appeal to the Supreme Court the test of directness was repudiated and the "rule of reason," previously advanced by Mr. Justice White in the dissenting opinion of the Trans-Missouri Case and now enunciated by Chief Justice White as the majority opinion, was set up finally and authoritatively by the court.[15] Mr. Justice Harlan sharply characterized the reading into the statute the word "unreasonable" as "judicial legislation," a deprivation of the statute of "practical value as a defensive measure against the evils to be remedied," and a virtual overruling of the Traffic Cases.[16] But the rule of reason was approved in the American Tobacco Company Case [17] and the subsequent cases,[18] and the objections of Mr. Justice Harlan were answered.[19]

With the "rule of reason" firmly and finally established by the judicial utterances of the Supreme Court, the recent case of *United States* v. *International Harvester Co.,* 214 Fed. 987, came before the Circuit Judges [20] in the District of Minnesota. The International Harvester Company was a consolidation of five harvester companies, which collectively produced about eighty-five *per centum* of all the harvesting machinery sold in this country. The

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[13] 173 Fed. 177.

[14] See also 23 HARV. L. REV. 209.

[15] Standard Oil Company of New Jersey *v.* U. S., 221 U. S. 1, 34 L. R. A. (N. S.) 834; see also 1 VA. L. REV. 188; 9 MICH. L. REV. 643; 11 COL. L. REV. 701.

[16] Standard Oil Case, *supra,* pp. 99, 104.

[17] U. S. *v.* American Tobacco Co., 221 U. S. 106.

[18] U. S. *v.* Reading Co., 226 U. S. 324; Nash *v.* U. S., 229 U. S. 373.

[19] American Tobacco Co. Case, *supra,* pp. 175, 179. The discussion of the "rule of reason" as applied to the Sherman Act has been almost wholly academic, for even in the Standard Oil and American Tobacco Co. Cases the court had no difficulty in finding from the facts that both were combinations in unreasonable restraint of interstate commerce.

[20] The Attorney-General having, under Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1911, p. 1383), filed with the clerk of the District Court a certificate that the case was of general public importance, it came on for hearing before the Circuit Judges, Sanborn, Hook, and Smith, notwithstanding the abolishment of the Circuit Court by Act March 3, 1911, c. 231, 36 Stat. 1167.

companies previously had been prosperous and keen competitors. The combination was effected by making one of the companies, of which the Harvester Company owned all the stock, with changed name, the exclusive selling agent for all the products of the several plants. No over capitalization was shown and the methods of conducting the business were in general fair to competitors. The Harvester Company purchased all of the stock of another large harvester company, permitting it, however, to continue doing business and advertising as an independent and competing firm. The court held that under §§ 1 and 2 of the Sherman Anti-Trust Act the international Harvester Company was organized to eliminate competition between the five harvester companies; it was *ab initio* a combination in restraint of interstate commerce; and it was an attempt to create a monopoly in harvesting machinery, although the restraint and monopoly had not been attempted to any harmful extent but was potential only. Accordingly the court decreed dissolution of the combination and monopoly into at least three separate and independent concerns in accordance with a plan to be submitted to the court within ninety days.

The Sherman Act must be construed in the light of reason.[21] If within the purview of the statute, the means by which the combination was effected is immaterial. While a transaction constituting an outright sale of a business is not prohibited by the Act,[22] the exchange of stock of competitive corporations for the stock of a single corporation, the substance of the transaction being simply a change in the form of investment and not an outright purchase for cash or its equivalent, is an illegal combination under the Act.[23] In the principal case the fact that the combination took the form of a new corporation was held in accordance with the previous decisions not to alter the case.[24] *A fortiori* a combination is illegal in which the holding corporation is itself one of the formerly competing corporations.[25]

The monopoly need not be complete.[26] Mere magnitude of business is not a guiding test.[27] The acquisition of control over interstate commerce by ordinary legitimate methods of business is not illegal.[28] In the principal case, however, the effect of the combina-

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[21] Harvester Case, *supra*, pp. 987, 994, citing the Standard Oil and American Tobacco Company Cases.

[22] Davis *v.* Booth (C. C. A.), 131 Fed. 31, 36. See also 19 HARV. L. REV. 472.

[23] Northern Securities Co. *v.* U. S., 193 U. S. 197.

[24] Harvester Case, *supra*, p. 994, citing American Tobacco Co. Case *supra*, and U. S. *v.* E. I. Du Pont De Nemours & Co., 188 Fed. 127.

[25] American Tobacco Co. Case, *supra;* Addyston Pipe Co. *v.* U. S., *supra;* Bigelow *v.* Calumet and Hecla Mining Co., 155 Fed. 869.

[26] Standard Oil and American Tobacco Co. Cases, *supra;* see also Bigelow *v.* Calumet and Hecla Mining Co., *supra.*

[27] See *In re* Greene, 52 Fed. 104.

[28] Dueber Watch Case Mfg. Co. *v.* Howard Watch Co., 55 Fed. 851; *In re* Corning, 51 Fed. 205; Whitwell *v.* Continental Tobacco Co. (C. C. A.), 125 Fed. 454.

tion was the substantial suppression of all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.[29]

The Harvester Company claimed the objects of the organization were: "— to build up a foreign trade; by the combination to secure more capitol to enable them to continue the battle in the foreign market; and by enlarging the scope of the business so as to include other lines of agricultural implements to make an all-the-year-around business; and that it was not the intention to oppress the domestic market and that they have not done so." [30] Whether a particular transaction is a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method employed. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the act was done is of no consequence.[31] In a late case [32] the Supreme Court said, referring to the Standard Oil and American Tobacco Company Cases: "These cases may be taken to have established that only such contracts and combinations are within the Act as, by reason of intent *or the inherent nature of the contemplated acts,* prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." It is submitted that the general principle of law that the legal intention of the parties, rather than their expressed or declared intention, controls. The act of the parties should be analyzed and their purposes inferred from the consequences that would naturally result. "'When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition, nor when the legality of their act or acquisition is in question is it any use for them to say, 'we have not used the power to oppress any one'." [33] To hold otherwise would render the "rule of reason" ineffective and absurd.

It has been held that the suppression of competition, where the parties to a combination control a large part of the interstate or foreign commerce in the manufactured goods and where no obligation to form the combination arising out of the fact that the com-

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[29] Northern Securities Co. *v.* U. S., *supra;* U. S. *v.* Reading Co., *supra.*

[30] Harvester Case, *supra,* p. 992. See The Law of COMBINED ACTION OR POSSESSION BY F. J. STIMSON, 45 AM. L. REV. 1, where the plea is made that "the ethical motive of the combine" should be the test under the Sherman Act.

[31] U. S. *v.* Reading Co., *supra;* U. S. *v.* St. Louis Terminal Assn., 224 U. S. 383, 394; Swift & Co. *v.* U. S., 196 U. S. 375.

[32] Nash *v.* U. S., *supra.*

[33] State *v.* International Harvester Co., 237 Mo. 369, 394, 141 S. W. 672, 677.

panies are losing money exists, or in similar contingencies, is an undue restraint of trade.[34] The five harvester companies could not have made a legal contract as to prices and hence they could not legally unite.[35]

In a strong dissenting opinion,[36] Circuit Court Justice Sanborn argued in effect as follows: Congress intended to prohibit those restraints and attempts to monopolize which are unduly injurious to the public by raising prices, limiting production, deteriorating quality, decreasing wages, or practicing unfair and oppressive treatment of competitors; and these evils being absent, no acts that are or threaten to be unduly injurious to the public exist to give jurisdiction to the court to enjoin and dissolve the combination.

It is submitted, however, that the majority opinion met the issue squarely. The Harvester Company could not lawfully restrain the interstate trade in order to build up a foreign trade. The company was not the result of normal growth of fair enterprise. It was created by the combination of competing companies which controlled the greater part of the output of agricultural implements and it maintained a substantial dominance. The inherent nature of the combination and the contemplated acts inferred from the extent of the control was to restrict unduly competition and thereby to obstruct potentially the course of interstate trade. The spirit of the Act interpreted in the light of the "rule of reason" is to forestall the usual effects, enumerated by the dissenting judge, flowing from the exercise of the potential power for greater evil. The raising of prices and similar acts are not the test of violations of the law; the artificial removal of competition by combination not rendered necessary in the course of business by loss of money or similar contingencies, constitutes the violation. Such removal of competition is a potential restraint of trade. The five harvester companies combined to monopolize a part of the interstate and foreign trade and therein violated §§ 1 and 2 of the Act. The Sherman Act was not enacted merely from concern over prices in dollars and cents. Rather it aimed at "the creation of artificial barriers across the avenues of industry, deemed destructive of the opportunity, initiative, and independence" of the people and their posterity.[37]

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[34] Continental Wall Paper Co. *v.* Voight and Sons Co., 212 U. S. 227; Swift & Co. *v.* U. S., *supra;* Addyston Pipe Co. *v.* U. S., *supra.*

[35] Ibid.

[36] Harvester Case, *supra*, p. 1002. The question whether or not prosecution was barred, because the three years limitation had passed after the combination and before institution of proceedings, was raised. The dissenting judge contended that by the "rule of reason" the presumption that those who have power to violate the law are presumed to do so was rebutted by the fact that no apparent evil economic effects by actual trial for at least seven years were proved by the government. But the majority of the court found in effect that the potential restraint of trade was continuing, justifying prosecution *ab initio* and as long as the combination unduly threatened fair competition and freedom of trade.

[37] Harvester Case, *supra*, p. 1001.